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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 852

BANK OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court (R. 8-18[1]) are reported at 155 F. Supp. 164. The opinion of the Court of Appeals (R. 19-38) is reported at 215 F. 2d 820.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1957. (R. 39.) The petition

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[1] "R" references are to Appendix B to the Petition for a Writ of Certiorari.

for a writ of certiorari was filed March 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below were correct in concluding that federal tax liens against a delinquent taxpayer's bank account, arising under Sections 6321 and 6322 of the Internal Revenue Code of 1954, were paramount to an alleged right of set-off asserted by the bank, and that the bank therefore was in possession of property subject to a levy and was liable under Section 6332 for its failure to surrender such property.

STATUTE INVOLVED

The pertinent provisions of Sections 6321, 6322, 6323(a), 6331(a) and (b), and 6332(a) and (b) are printed in the Appendix, *infra*, pp. 15-17.

STATEMENT

The facts, which were entirely stipulated (R. 20, 23), were summarized by the Court of Appeals (R. 20-23) as follows:

On November 15, 1954, certain withholding and federal insurance contributions act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada (hereinafter referred to as the taxpayer). On the following day, the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so. (R. 20.)

On January 12, 1955, a notice of tax lien pertaining to this assessment was filed with the County Recorder of Clark County, Nevada. (R. 20.)

On February 28, 1955, and on August 31, 1954, the taxpayer submitted financial statements to the Bank of Nevada (hereinafter referred to as the bank). Each statement read in part as follows (R. 20-21):

> The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then and in such case, *at your option*, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a con-

> tinuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary. [Emphasis supplied.]

On March 1, 1955, certain federal excise taxes for the calendar year 1954 amounting to $187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment. Demand was made upon him to pay it, but he has refused to do so. (R. 21.)

On April 16, 1955, the taxpayer and his wife, Doris L. Bentley, borrowed $2,000 from the bank and executed a promissory note in favor of the bank for that amount. (R. 21.)

On May 31, 1955, the taxpayer submitted to the bank another financial statement, containing the same provision relating to the bank's right of set-off that has been quoted above. (R. 21-22.)

On June 10, 1955, the taxpayer had on deposit in an account with the bank the sum of not less than $878.16. At 1:45 p.m. on that day, the United States, through one of its collection officers, served a "Notice of Levy" upon the bank by delivering it to E. K. Phillips, the assistant cashier. This Notice of Levy covered both of the assessments referred to above. (R. 22.)

On that same day, A. M. Smith, vice president and manager of the bank's First and Fremont Branch, wrote to the collection officer as follows (R. 22):

> This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.
>
> I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy.

The "unsecured indebtedness" referred to in the above letter was the balance of the note for $2,000, referred to above, which balance, at the time of the levy, amounted to approximately $1,500. The bank exercised its "claimed" right of setoff subsequent to 1:45 p.m. on June 10, 1955, the precise time at which the collection officer delivered the Notice of Levy to the bank's assistant cashier. The bank conceded that it exercised its right of setoff "thereafter." (R. 22.)

On June 13, 1955, a notice of federal tax lien pertaining to the assessment of federal excise taxes was filed in the office of the County Recorder of Clark County, Nevada. (R. 23.)

On June 14, 1955, the collection officer served a final demand upon the bank's vice president and manager of its First and Fremont Branch. (R. 23.)

On September 28, 1955, the United States filed suit in the court below to recover from the bank the sum of $878.16, with interest and costs. That sum represented the amount which the taxpayer had on deposit with the bank on June 10, 1955. (R. 23.)

The District Court held that the federal tax liens were paramount and valid liens, and that the United States was entitled to judgment as prayed for. (R.

23.) The Court of Appeals unanimously affirmed (R. 39).

ARGUMENT

Section 6321 of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 15) provides that, if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Section 6322 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 15-16) provides that this lien is deemed to arise at the time the assessment is made and continues until the liability for the amount assessed is satisfied.

If the person who is liable to pay the tax neglects or refuses to do so within ten days after notice and demand is made upon him, the Secretary of the Treasury, or his delegate, may collect such tax by levy upon all property and rights to property (with certain exceptions not pertinent here) belonging to such person or on which there is a lien. Section 6331 of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 16). Upon such a levy, any person who is in possession of property or rights to property which are subject to the levy shall, upon demand, surrender such property or rights to the Secretary or his delegate, unless the property is, at the time of demand, subject to an attachment or execution under any judicial process. Section 6332(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 16-17). Any person who, upon demand, fails or refuses to sur-

render property or rights to property which is subject to levy is liable in his own person or estate to the United States in a sum equal to the value of the property not surrendered (not to exceed the amount of the taxes for the collection of which the levy has been made, together with costs and statutory interest from the date of the levy). Section 6332(b) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 17).

It is clear from the stipulated facts in this case that the bank was in possession of property belonging to a delinquent taxpayer.[2] A federal tax lien had attached to this property and it was subject to levy. Demand was properly made upon the bank and it refused to surrender the property. The bank, pursuant to Section 6332(b) of the 1954 Code, accordingly became personally liable to the United States for its failure to surrender such property, and the courts below (R. 18, 39) were correct in so holding.

Specifically, on November 15, 1954, taxes in the amount of $804.50 were assessed against the taxpayer; the taxpayer was notified of this assessment, demand was made upon him, and he has neglected or

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[2] It is well-established, and undisputed, that the word "property", as used in the statutory provisions involved herein, is to be construed broadly and includes obligations, debts owing to the taxpayer and other intangibles. A bank account, being a debt of the bank to the depositor, is thus "property or rights to property" against which a lien may attach and a levy may be made. *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Eiland*, 223 F. 2d 118 (C.A. 4th); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C. A. 2d). See also *Glass City Bank* v. *United States*, 326 U. S. 265.

refused to pay the assessed amount. (R. 20.) Similarly, on March 1, 1955, additional taxes in the amount of $187.51 were assessed against the taxpayer; the taxpayer was notified of this assessment, demand was made upon him, and he has neglected or refused to pay the assessed amount. (R. 21.) Pursuant to Sections 6321 and 6322 of the 1954 Code, federal tax liens, in the amounts of $804.50 and $187.51, arose on November 15, 1954, and March 1, 1955, respectively, and attached to all property or rights to property belonging to the taxpayer; these liens were to continue until the liability for the assessed amount was satisfied.

On June 10, 1955, the taxpayer owned property, in the form of a checking account with the bank, in the amount of not less than $878.16. (R. 22.) On this date, the District Director, pursuant to Section 6331(a) of the 1954 Code, levied upon, and demanded the surrender of, the checking account of the bank. (R. 22.) The bank was required by Section 6332(a) to surrender this amount, but it refused to do so. (R. 22-23.) Accordingly, under Section 6332(b), the bank became liable in its own person and estate in the sum equal to the amount of the account ($878.16), together with costs and statutory interest from the date of the levy.

As the Court of Appeals correctly held (R. 27-28), Section 6332(a) permits the bank only two defenses: (1) that it was not in possession of property of the taxpayer which was subject to levy; (2) that the property was subject to a prior judicial attachment or execution. *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2); *Commonwealth Bank* v.

United States, 115 F. 2d 327 (C. A. 6th). Here, there is no question of a judicial attachment or execution by the bank or anyone else. And, as the court below held (R. 28), the bank was in possession of property of the taxpayer at the time of the levy.

The bank, however, asserts (Pet. 3, 5) that the loan, which was made by the bank to the taxpayer on April 16, 1955 (R. 21), gave rise to a right of set-off, which was inseparable from the debt to the bank, in that both arose out of the same transaction. The bank then asserts that the right of set-off was exercised at the moment the levy was served. The bank thus apparently contends that, at the time of the levy (June 10, 1955), it was not in possession of property belonging to the taxpayer which was subject to the levy. In this connection, the bank cites *United States* v. *Bank of Shelby*, 68 F. 2d 538 (C. A. 5th), which it contends (Pet. 6-7) is in conflict with the decision in this case.

The Court of Appeals, however, correctly rejected the bank's defense (R. 32-33). Most important, the court noted (R. 32) that the tax liens were in existence, and had attached, at the time the loan to the taxpayer was made. Accordingly, as the court below held (R. 28-29), whatever rights the bank obtained as a result of this loan were born with the tax lien impressed thereon. *United States* v. *Graham*, 96 F. Supp. 318, 321 (S.D. Cal.), affirmed *per curiam sub nom. State of California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831. It is axiomatic that the first in time is the first in right. *United States* v. *New Britain*, 347 U. S. 81, 85-86.

The only semblance of a right of set-off in this case was the contractual right arising from the filing of the financial statements by taxpayer on August 31, 1954, February 28, 1955, and May 31, 1955. (R. 20-21, 21-22.) On the dates the tax liens attached and, indeed, at the time of the levy, this right was, as the court below phrased it (R. 31), "inchoate in the extreme." *United States* v. *New Britain, supra; United States* v. *Acri*, 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co., supra; United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47. The right would not arise until (1) a loan had been made, (2) one of a number of contingencies occurred,[3] and (3) the bank exercised its option to set-off. (R. 20-21.) By the time this contractual right could even be considered to have become choate (subsequent to 1:45 p.m. on June 10, 1955), the tax liens had attached *and* the levy had been made.[4] As the court below held (R.

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[3] *I.e.:* (a) if the taxpayer failed in business or became insolvent; (b) if the taxpayer's deposit account or any other property of the taxpayer held by the bank was the subject of an attempt to be obtained or held by writ of execution, garnishment, attachment, or other legal process; (c) if the taxpayer failed to notify the bank of any material change in the taxpayer's financial condition; or (d) if any of the taxpayer's representations proved to be untrue. (R. 33.)

[4] Indeed, it does not even appear that the bank actually attempted to exercise its option to set-off. Although the bank stated in a letter to the collection officer (R. 22) that it was exercising its option to set-off, the bank records show that it did not, in fact, set-off the amount in the taxpayer's bank account against the debt owed the bank. Instead, the bank honored taxpayer's withdrawals on the date of the set-off and charged taxpayer's account only with the amount of the Director's levy, not the amount of the remaining bal-

27-33), the bank could not shield the taxpayer's account by an inchoate agreement with the taxpayer and the bank's inchoate right of set-off cannot override the choate federal tax lien. *United States* v. *Security Tr. & Sav. Bk., supra; United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587.[5]

The decision of the Fifth Circuit in *United States* v. *Bank of Shelby*, 68 F. 2d 538, is not in conflict with the decision in this case. Contrary to the bank's

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ance in the account ($209.71, plus a $20 deposit which was accepted) or the amount of the debt owing to the bank at the time of the levy ($1,500). The bank continued to honor withdrawals and accept deposits thereafter and it does not appear that it ever set-off the full amount of the debt. (See Transcript of Record filed in the Court of Appeals, pp. 26-27.)

[5] The bank (Pet. 9-10) apparently has abandoned its contention that the contractual right of set-off related back to the date of the first financial statement (August 31, 1954), which was prior to the dates the tax liens arose. Such contention was wholly without merit. The doctrine of relation-back cannot be used to defeat a federal tax lien. *United States* v. *Security Tr. & Sav. Bk., supra.*

Similarly, the bank has apparently abandoned its contention that the note was a demand note and that an equitable right of set-off arose upon execution thereof. Both courts below found (R. 11-12, 34-35) that the note was not, in fact, a demand note. Indeed, as the Court of Appeals noted (R. 35), even if the note was a demand note, the tax liens had already attached on the date of the execution of the note and, furthermore, an equitable right of set-off arises with respect to a demand note only upon the insolvency of the maker, upon his refusal to pay, or where the creditor has no practical legal remedy. *American Surety Co.* v. *City of Akron*, 95 F. 2d 966 (C. A. 6th). Such was not the case here.

contention (Pet. 7), the *Bank of Shelby* decision is not based solely upon the fact that the obligations between the bank and the delinquent taxpayer arose out of the same transaction. The Fifth Circuit first noted that the statute establishing liability upon the bank for refusing to honor a levy (a predecessor to Section 6332 of the 1954 Code) was not even in effect on the date of the first levy in that case. The court also based its decision on the fact that, even though further levies were made upon the bank after the effective date of the statute, the depositor-taxpayer was insolvent prior to the first levy. The court held (p. 539) that the insolvency of the debtor created an equitable right of set-off and that no property of the taxpayer existed on the date of the levy. Here, there is no question of insolvency. The two cases are thus clearly distinguishable.

The bank further contends (Pet. 5) that the balance in the delinquent taxpayer's account was not his money, but the bank's, and that the taxpayer only had a (Pet. 9) "revocable license" to use the credit balance in his account. The bank then asserts (Pet. 9) that the United States' rights rise no higher than those of the taxpayer. However, even assuming *arguendo* that the Government could reach nothing that the taxpayer could not reach, it is clear that the taxpayer had full and unrestricted use of the account, prior and subsequent to the levy. On the very day of the levy, taxpayer withdrew and deposited various amounts, and he has continued to do so. As noted above (see fn. 4, *supra*), it does not appear that the bank has ever set-off the full amount of the debt.

Finally, the bank implies (Pet. 4, 8) that it should be entitled to actual notice of the federal tax liens.[6] In this connection, the bank also asserts (Pet. 7-8) that the decision in this case will have a great impact on banking transactions. The plain answer to these contentions is that the applicable statutory provisions clearly set forth the priority of tax liens, as well as the broad remedy of levy as a device to enforce the collection of taxes. See *United States* v. *Eiland*, *supra*, pp. 121-122; *United States* v. *Manufacturers Trust Co.*, *supra*, p. 368. The personal liability of the bank for failure to surrender the property levied upon is clear. There is nothing in the plain language of the statute, or in the decisions, to indicate that banks are entitled to actual notice or are to be accorded any preferred treatment as compared with other types of creditors.[7]

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[6] The first lien was recorded prior to the date of the bank's loan to the taxpayer and the second lien was recorded after the levy upon the bank. (R. 20, 23.)

[7] The only persons entitled to even *constructive* notice, under the statute, are mortgagees, pledgees, purchasers, or judgment creditors. See Section 6323(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 15-16). Taxpayer asserts (Pet. 10) that, insofar as the Government contended that the claimed right of set-off is tantamount to a claimed prior lien, it would be entitled to constructive notice as a pledgee. However, Congress used the words in Section 6323 in the usual, conventional sense (see *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364), and a bank is not a pledgee with respect to the accounts of its depositors. See *Nelson* v. *Commissioner*, 101 F.2d 568, 571 (C. A. 8th). Furthermore, the first tax lien, at least, was recorded prior to the date of the loan. (See fn. 6, *supra*.)

In this connection, the bank also cites Rev. Rul. 57-367,

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958

1957-32 Int. Rev. Bull. 22. (Pet. 4.) That ruling merely holds that, if a bank does not have actual notice of a tax lien, the bank will not incur liability to the Government if it makes payments to a depositor. However, if, as here, the bank receives actual notice, the ruling provides that the bank may protect itself by withholding payment of the sum in question. In the instant case, the bank did not comply with this ruling.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, wherever the State or Territory has

by law designated an office within the State or Territory for the filing of such notice; or

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6323.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary of his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as

is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interests on such sum at the rate of 6 percent per annum from the date of such levy.

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6322.)

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